

The record before the Appeals Board is the same as that considered by the Administrative Law Judge and includes the transcript of the preliminary hearing held on

May 10, 1994 together with the exhibits introduced at that hearing, the deposition testimony of Edward D. Shellito taken on May 12, 1994, and the pleadings filed of record.

### **ISSUES**

Claimant appeals the decision of the Administrative Law Judge finding for purposes of preliminary hearing that claimant has failed to establish the compensability of this claim. Respondent denies claimant suffered an accidental injury arising out of and in the course of his employment and denies notice was timely given.

### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

(1) The issues raised on appeal, i.e. whether the claimant's injury arose out of and in the course of his employment and whether notice was timely given are issues listed in K.S.A. 44-534a as issues which the Appeals Board does have jurisdiction to review on appeals from preliminary orders.

(2) After review of the entire record and consideration of the arguments made by counsel, the Appeals Board finds that claimant has not proven by a preponderance of the credible evidence that his injury arose out of and in the course of his employment. The Appeals Board does, therefore, affirm the decision by Administrative Law Judge George R. Robertson.

Claimant initially alleged his accidental injury occurred on November 19, 1993. After a review of time records and further deliberation, claimant amended his claim to allege an accident occurring on November 29, 1993. However, at the time of the preliminary hearing, claimant remained uncertain as to his accident date. He testified that he does not really know whether he was injured on November 19 or November 29. The best he could do was to say that it was within those dates.

Claimant described an incident which occurred while working with Don Peterson pulling grain from a bin with a bucket when he injured his back. He states that he told Don "I've done something to my back, I need to go home". Don is alleged to have replied "Oh, Bill, it's all in your head, keep on working", which he did. About forty-five (45) minutes later he alleges he again told Don that he had hurt his back and was going home. Whereupon he got up and left. Claimant testified that he had never before had a back injury. Following the alleged accident he saw a chiropractor daily for about two (2) weeks. He alleges that he told the manager, Ron Griffith, that he was going to the chiropractor. After two weeks of treatment he was still in excruciating pain although he was continuing to work. He then decided to see his family physician, Dr. Hein. The Smith Center Family Practice office note of December 20, 1993 indicates that he reported being hurt two and a half (2 1/2) to three (3) weeks prior to that date. Dr. Hein told him to stay off work. He gave him a steroid injection and prescribed a pain killer. Claimant states that he took the off work note to his employer. In addition to reporting his injury to Mr. Peterson he states that he also told Mr. Griffith that he was going to the chiropractor because he was hurt on the job. He also believes that he discussed his injury with his father-in-law, Ed Shellito, within the first week after his injury while he was seeing the chiropractor, Dr. Kloster. His father-in-law also works for respondent and is a supervisor.

Ronald Griffith is general manager of the Smith Center Coop. He testified that his first knowledge of an alleged work related accident was when he received a billing inquiry from Dr. Kloster. He knew that claimant had been going to a chiropractor but he did not know that it was alleged to be for a work related condition. According to Mr. Griffith, it was toward the end of December, 1993 when he received the bill from Dr. Kloster. He then provided claimant with an accident report form to fill out and return, which the claimant did on approximately January 3, 1994. He did recall that Bill Wylie had previously reported having injured his back when he fell over hog panels at his residence. Claimant was raising hogs on his own at that time. He was also working part time at the local theater. Mr. Griffith testified that there are only eight (8) people that work at the Coop. He sees the other workers regularly and there is no communication problem between himself and the workers.

Donald Peterson recalls a time in late November when he was working with claimant filling buckets of grain. He does not recall claimant saying anything about injuring himself but he does recall that when he asked claimant to help him with that job claimant said "I was born with a bad back". He thinks that claimant may have commented about his back but he denies claimant telling him that he hurt his back there at work. Mr. Peterson did not pass along the references to back complaints to a supervisor because he did not feel that claimant was telling him that he had injured his back but rather that he had a sore back and that it had been sore. If claimant had told him that he injured his back on the job then he would have reported it. According to Mr. Peterson, claimant was not enthusiastic about staying and working that night. He had lots of excuses about other places he needed to be and was trying to get out of working. He recalls working with claimant until claimant said he was leaving. His understanding was that claimant was simply going home, not that he was injured. He did see claimant when he returned to work and claimant never told him that he had hurt himself lifting the grain.

Claimant's wife, Shawwna Wylie testified that she called the Co-op on several occasions to advised them that her husband would not be able to work. She admits that she did not specifically tell anyone at the Co-op that her husband was unable to work because he had hurt his back at the Co-op because she thought they already knew that. She does think that she told her father, Edward Shellito, about Bill having hurt his back pulling up the buckets of grain.

The deposition of Edward Shellito was taken after the preliminary hearing. According to Mr. Shellito he first learned that his son-in-law, Bill Wylie, was claiming a work injury from the Co-op manager, Ron Griffith. His understanding was that the secretary for the chiropractor claimant was treating with had called Ron Griffith and advised him that Bill Wylie had alleged that he was injured on the job and she needed information to submit the bill to their workers compensation carrier. After that telephone call Mr. Griffith asked him if he knew anything about Bill having injured himself at work. He did not recall claimant having said anything to him about a work injury when questioned by Mr. Griffith. He does recall talking to his son-in-law about his injury but he thinks that that occurred after his conversation with Ron Griffith.

From these facts and from the evidence presented in the record as a whole, the Appeals Board concludes that claimant has not met his burden of proving an injury arising out of and in the course of his employment. His request for temporary total disability compensation and medical treatment was, therefore, properly denied.

**AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the decision of Administrative Law Judge George R. Robertson, in his Preliminary Hearing Order dated May 16, 1994, should be, and is hereby affirmed in all respects.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of October, 1994.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

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George R. Robertson, Administrative Law Judge

**WILLIAM WYLIE**

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**DOCKET NO. 187,360**

George Gomez, Director